No. 77-1423

In the
Supreme Court of the United States
OCTOBER TERM, 1977

ALFRED PAVONE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, ALFRED PAVONE, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is appended to this Petition as Appendix A.

JURISDICTION

Petitioner was held in contempt by order of the United States District Court for the Northern District of Illinois. Petitioner appealed pursuant to 28, *U.S.C.* § 1826(b).

The Court of Appeals, affirmed by unpublished order, (attached hereto as Appendix B) dated February 2, 1978. The mandate of the Court of Appeals was stayed pending filing of an opinion, which opinion was filed on February 13, 1978. Thereafter, upon Petitioner's timely Petition for Rehearing with *En Banc* Suggestion, the Court of Appeals denied the Petition by Order of March 13, 1978 (appended hereto as Appendix C). The jurisdiction of this Court is invoked under 28, *U.S.C.* § 1254 (1) and Rule 22.3 of the Rules of this Court.

QUESTIONS PRESENTED

Whether a federal grand jury witness may assert as a "just cause" defense to a contempt petition for refusal to answer questions before the grand jury that the witness was the subject of illegal electronic surveillance under the purported authority of a court order, a question expressly left open by this Court in *Gelbard* v. *United States,* 408 U.S. 41 and upon which there is a division of authority among the various Circuits?

Whether such a witness is entitled to the minimal disclosures required by 28, *U.S.C.* § 2518 (9) of the court order and accompanying application under which the interception was approved?

Whether such a witness is an "aggrieved person" within the meaning of 28, *U.S.C.* § 2518 (10) so that the witness would be entitled to the protections of that subsection including its additional discovery and the right to make a motion to suppress the use and derivative use of such intercepted communications?

STATUTES INVOLVED

18, *U.S.C.* § 2510

> As used in this chapter—
>
> • • •
>
> "(11) 'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

18, *U.S.C.* § 2215

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

18, *U.S.C.* § 2518

> • • •
>
> "(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice." • • • • •

18, *U.S.C.* § 3504

"(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and . . .

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510 (5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto."

STATEMENT OF THE CASE

Petitioner, Alfred Pavone, appeared before the Special February, 1977 Grand Jury for the Northern District of Illinois, pursuant to subpoena. Upon his refusal to answer questions propounded him by virtue of his privilege against self-incrimination, the government sought an order granting Mr. Pavone immunity pursuant to Title 18, *U.S.C.* §§ 6002 and 6003. The order was subsequently entered and the witness was again directed to appear before the special grand jury. Upon Mr. Pavone's subsequent appearance before the special grand jury, Mr. Pavone again refused to answer questions propounded to him based, in part, on his belief that the questions asked were based upon an electronic surveillance obtained in violation of Title 18 of the *United States Code,* Section 2510 and the following sections.

On December 15, 1977, pursuant to the government's petition to hold Mr. Pavone in contempt, the witness again appeared before the Honorable James B. Parsons, Chief Judge of the District Court. The government acknowledged at that hearing that Mr. Pavone had been the sub-

ject of a wiretap, that his communications were intercepted on said wiretap and that the questions propounded to him before the special grand jury were as a result of the intercepted communications. The government, however, claimed the wiretap was lawful. Mr. Pavone thereupon filed a Motion for Discovery, a Motion to Suppress Unlawfully Intercepted Communications and a Motion to Quash the Grand Jury Subpoena. These motions requested production of the court order authorizing the interception of communications, the affidavits and application for the order, logs of the interceptions, reports, summaries or transcripts of the intercepted communications and an opportunity to listen to the recordings, as well as requesting a hearing on the Motion to Suppress. Mr. Pavone also filed an Answer to the Petition for Contempt alleging as just cause for his refusal, that the questions asked of him were the result of an illegal electronic surveillance.

The motions were denied and Mr. Pavone was not allowed any discovery whatsoever. The government did acknowledge that the witness did have the right to have an *in camera* review by the District Court of the application for the authorization, and supporting affidavits, the order authorizing the interception and the logs of the wiretap. The problem then arose as to whether Judge Parsons should perform that limited review or whether it should be done by another judge of the District because Judge Parsons had himself authorized the wiretap. The Petitioner objected to Judge Parsons himself reviewing the materials. Even the government suggested that the review be made by another judge of the District. Though Judge Parsons initially expressed reluctance to review "my own handiwork," in the end, Judge Parsons did review the materials and thereafter allowed the government's petition to hold the Petitioner in contempt.

REASONS RELIED UPON FOR ISSUANCE OF THE WRIT

THE ISSUE OF THE EXTENT TO WHICH A GRAND JURY WITNESS MAY ASSERT THE ILLEGALITY OF A COURT-ORDERED SURVEILLANCE AS A DEFENSE TO A CONTEMPT PETITION IS ONE NOT ONLY OF IMPORTANCE BUT A RECURRING PROBLEM UPON WHICH THERE IS A DIVISION OF AUTHORITY AMONG THE CIRCUITS, AND ONE WHICH HAS BEEN EXPRESSLY LEFT UNANSWERED BY THIS COURT.

Petitioner, Alfred Pavone, was held in contempt for refusal to answer certain questions before a federal grand jury, which the government admits are the product of an electronic surveillance. He asserted as a "just-cause"[1] defense to the contempt petition that the electronic surveillance was an unlawful one. Pursuant to that claim he also filed a motion for discovery of certain materials relating to the electronic surveillance and a motion to suppress the unlawful surveillance and its fruits. The District Court refused to allow any discovery to the petitioner, and refused to hold an adversary evidentiary hearing on the motion to suppress but rather conducted an *in camera* inspection of certain of the requested materials and the grand jury transcript and held Petitioner in contempt.

This Court has held in *Gelbard* v. *United States,* 408 U.S. 41 (1972) that an alleged contemnor may assert as a defense to the contempt that the questions he refused to answer are based upon an electronic surveillance which was unlawful. This Court based its decision on an examination of the language and legislative history of Title III of the Omnibus Crime Control Act (Title 18, *U.S.C.* § 2510 *et seq.*) This Court noted that ". . . the protection

[1] Pursuant to Title 28, *U.S.C.* § 1826.

of privacy was an overriding congressional concern. (408 U.S. at 48.) Thus, it was reasoned that, since § 2515 forbids the reception at a grand jury proceeding of evidence obtained in violation of Title III, "[t]he purposes of § 2515 and Title III as a whole would be subverted were the plain command of § 2515 ignored when the victim of an illegal interception is called as a witness before a grand jury and asked questions based upon that interception." (408 U.S. at 51.)

Due to the particular factual circumstances of the Gelbard case, this Court assumed that the interceptions there were unlawful under Title III. (408 U.S. at 47.) Even though certain of the wiretaps in the *Gelbard* case were pursuant to court order (408 U.S. 44) this Court expressly left undecided whether a witness may refuse to answer questions if the interception was pursuant to court order. (408 U.S. at 61 n. 22.)

The question of the statutory rights of a witness such as Petitioner, who was subject to a court-ordered surveillance is one upon which there is a division of authority among the Circuits.

At issue is first, whether such a witness is entitled to be furnished with a copy of the order authorizing the interception and the accompanying application, which 18 *U.S.C.* § 2518 (9) by its unambiguous terms requires, in order that the witness may perfect a defense to a contempt petition. Secondly, at issue is whether such a witness in a contempt hearing is entitled to make a motion to suppress the fruits of an unlawful interception, a right which is given to "any aggrieved person" by § 2518 (10) ". . . in any trial, hearing or proceeding in or before any court. . ." The First, Third and Eighth Circuits answer these questions in the affirmative subject to certain rea-

sonable limitations. (*In Re Lochiatto,* 497 F.2d 803 (1st Cir., 1974); (*In Re Grand Jury Investigation, Appeal of Maratea,* 444 F.2d (3rd Cir., 1971) and *Melickian* v. *United States,* 547 F.2d 416 (8th Cir., 1977) *cert den.* 430 U.S. 986. On the other hand, the Second, Fifth and Ninth Circuits, now joined by the Seventh Circuit as a result of the opinion below, answer these questions in the negative. (*In Re Persico,* 491 F.2d 1156 (2d Cir. 1974) *cert. den.* 419 U.S. 924 *reh. den.* 419 U.S. 1060; *United States* v. *Worobyzt,* 522 F.2d 196 (5th Cir., 1975) *cert. den.* 425 U.S. 911 and *Droback* v. *United States,* 509 F.2d 625 (9th Cir., 1974) *cert. den.* 421 U.S. 964.)

Subsection 9 of 18, *U.S.C.* provides, in pertinent part:

> "The contents of any intercepted . . . communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in a Federal or State Court unless each party . . . . has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized."

In the instant case, the questions asked of Petitioner were, upon the admission of the government, derivative of the electronic surveillance. As part of the proceedings on the contempt petition the transcript of the grand jury proceedings, containing those questions, was reviewed *in camera* by the District Court. It is respectfully suggested that this review of the transcript by the District Court constituted a disclosure of the contents[2] in a proceeding in

[2] 18, *U.S.C.* § 2510 (8): "contents" when used with respect to any wire or oral communication, includes information concerning the identity of the parties to such communication or the existence, substance, purport or meaning of that communication.

a Federal court such as to trigger the right of Petitioner to be furnished with the court order and accompanying application. Moreover, such information was needed by Petitioner at a bare minimum in order to even begin to prepare a defense to the contempt petition, under § 2515. Yet the District Court refused to order that Petitioner be provided with such materials.

Subsection 10 of 18, *U.S.C.* § 2518 provides generally that an "aggrieved person" in any trial, hearing or proceeding may move to suppress the contents of the interception or evidence derived therefrom, on the grounds that 1.) the communication was unlawfully intercepted; 2.) the order of authorization is insufficient on its face; or 3.) that the interception was not made in conformity with the order. That subsection also gives the judge discretionary power to order inspection of the intercepted communication or derivative evidence.

It is respectfully suggested that Petitioner, at the hearing upon the contempt petition, had the standing to make such a motion upon any of the three grounds listed in the statute. In that the questions asked of him were based upon the interception of his communications he is certainly an "aggrieved party". And insofar as his refusal to answer those questions was the basis for the contempt petition, and the transcript of those questions embodying such "contents" was a necessary part of the evidence at the hearing, it would seem clear that he might move to suppress such derivative use of the interception upon any of the three listed grounds. The District Court however, limited the Petitioner's rights under this subsection to but one of the three listed grounds, the facial validity of the application and order and that by way of an *in camera* inspection rather than an adversary hearing at

which Petitioner might have the effective assistance of counsel.

While it is true that the *Gelbard* decision expressly left undecided the right of the witness to refuse to answer questions based on a court-ordered interception, it would seem to be the clear thrust of the reasoning of that decision that questioning the result of any unlawful interception would give the witness the right to assert a § 2515 defense to a contempt petition. It is respectfully suggested that the mere existence of a court order does not assure the legality of the interception, and that Petitioner and others similarly situated should be afforded the statutory rights given under § 2518 (9) and (10) in order that they may develop their defenses, if any, to contempt citations leading to incarceration for up to thirty-six months.

Such has been the position of the First, Third and Eighth Circuits. (*In Re Lochiatto, supra, Melickian* v. *United States, supra* and *In Re Grand Jury Investigation, Appeal of Maratea, supra.*) In a well-reasoned opinion, the First Circuit in *In Re Lochiatto,* 497 F.2d 803 (1st Cir., 1974) said:

> "Since we find no basis in the statute for concluding that prosecutorial say-so is a sufficient guarantee of lawfulness, we must probe further. Title 18 *U.S.C.* §§ 2515 and 2518 are among the "laws of the United States" regulating use of electronic surveillance. In our recent decision, *In re Marcus,* 491 F.2d 901 (1st Cir., 1974), we examined the ruling in *Gelbard* v. *United States, supra,* which established that § 2515 and § 2518 were tied to one another to the extent that a witness who is recalcitrant before a grand jury and is then faced with contempt proceedings may defend on the basis of § 2518 (10) (a). We also indicated that although *Gelbard* did not deal with the problem of court authorized surveillance we faced in

Marcus and must again examine here, it indicated that the relationship between the two sections existed independently of the particular facts. We held that although § 2518 (10) (a) gives no standing to a prospective grand jury witness to be heard on a motion to suppress, § 2515 allows such a witness to assert, in defense of a contempt proceeding, the grounds enumerated in § 2518 (10) (a)(i), (ii), (iii) which we have previously set forth."
[497 F.2d at 806.]

To this end, the Court would allow the disclosure necessary to develop these defenses, subject, of course, to a legitimate need for secrecy, which upon suggestion by the government, would be a determination for the judge. As has been noted, the Third and Eighth Circuits also follow this approach, a careful balancing of the triple objectives of minimizing delay, securing the government's interest, if any, in secrecy and protecting a witness' right to assert the defenses Congress established. (497 F.2d at 807).

The Second, Fifth, Seventh and Ninth Circuits, while recognizing that even in the situation of a court-ordered interception, a witness may assert a § 2515 defense, limits that right to a defense based on the facial validity of the authorization. It would seem that such holdings fly in the face of the congressional interest as expressed in § 2518 (10) to allow a witness to defend on any of the three listed grounds. And these Circuits do not even require an adversary hearing, at which the witness might have the assistance of counsel, but rather merely an *in camera* examination by the judge. While such may be a sufficient hearing on a challenge to the facial validity of the order under § 2518(a)(10)(ii), as the Court in the *Lochiatto* case observed:

"Unlawfulness and non-conforming interception under subsections (i) and (iii) have no such built-in methods for expeditious testing. That there can be no such testing, unless a witness is fortuitously in possession of evidence to support a challenge or the government affirms illegality, cannot have been the intent of Congress. The questions may be close, difficult, and controversial; important individual interests are at stake; the need for adversial development, absent countervailing consideration, is obvious. [497 F.2d at 808.]

CONCLUSION

By reason of the importance of the questions here presented, by reason also of the recurring nature of this problem, and by reason also of the division of authority among the Circuits on this question, it is most respectfully suggested that a Writ of Certiorari should issue to review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-1020

In the Matter of:
SPECIAL FEBRUARY, 1977 GRAND JURY

Appeal of:
ALFRED PAVONE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 GJ 1631—JAMES B. PARSONS, *Judge*.

ARGUED JANUARY 30, 1978—DECIDED FEBRUARY 2, 1978

Before CUMMINGS, SPRECHER, and WOOD, *Circuit Judges*.

PER CURIAM. Alfred Pavone, subpoenaed as a witness before the Special February, 1977 Grand Jury of the Northern District of Illinois, was thereafter found to be a recalcitrant witness by the district court, held in contempt, and ordered confined pursuant to Title 28, U.S.C. § 1826(a).[1] On appeal, Pavone raises two major issues.

[1] Title 28, U.S.C. § 1826(a) provides in pertinent part:
(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon

He asserts as a defense to the contempt charge that the questions he was asked before the grand jury were based on information obtained through illegal electronic surveillance, and therefore his refusal to answer was justified. Pavone further argues that he was entitled to full discovery of materials possessed by the government relating to the authorization and execution of the electronic surveillance. Secondly, Pavone challenges the manner in which the contempt hearing was conducted, which included an *in camera* inspection of the wire interception documents before the same judge, Chief Judge Parsons, who initially authorized the wire interception. We affirm.[2]

The issues arose in this manner. Pavone responded to the grand jury subpoena on October 20, 1977, but refused to answer the questions propounded by asserting his Fifth Amendment privilege against self-incrimination. On November 17, 1977, pursuant to a petition filed by the government the district judge entered an order granting Pavone immunity according to the provisions of Sections 6002 and 6003, Title 18, U.S.C. Pavone was ordered to appear again before the grand jury. Upon his second

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[1] (Continued)

such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement as a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

[2] Because of the requirements of Sec. 1826(b), Title 28, U.S.C., requiring any appeal from confinement as a recalcitrant witness to be disposed of no later than thirty days after the filing of the appeal, this court issued an order on February 2, 1978, affirming the trial court which this opinion is intended to more fully explain.

appearance, Pavone again refused to answer the questions propounded by stating that the "inquiry is based upon illegal electronic surveillance obtained by violation of Title 18 of the United States Code, Section 2510, and the following sections and in particular, Section 2515 and also because my answer could incriminate me." The government responded by filing a petition for contempt. At the hearing on the petition on December 15, 1977, the government conceded that Pavone had been the subject of a wiretap authorized by the court pursuant to the provisions of Sections 2516 and 2518, Title 18, U.S.C., and that the questions propounded to Pavone before the grand jury were the result of Pavone's intercepted communications. Pavone answered alleging that the wire interceptions were violative of one or more of the various statutory requirements, at other times were accomplished without any court order, and moved for full discovery. Sought by Pavone was the opportunity to hear all the original tape recordings of the intercepted conversations, and the opportunity to examine the transcripts of the conversations, also any logs or summarizations or reports quoting the intercepted communications, copies of affidavits and applications for court authorizations, copies of any periodic reports of the agents intercepting the conversations, and the order of the court authorizing the interception. The discovery requested was denied. The trial judge found that Pavone's conclusionary allegations of unlawful interceptions were nothing more than conjecture and suspicion, but did undertake an *in camera* examination of the documents relating to the wire interception which had been previously authorized. The court found no necessity for an extended hearing.

On December 21, 1977, the trial judge advised the parties that he had examined the petitions upon which the wire interception authorizations were based and found that they were sufficient in fact and in law. He further found that the supporting affidavits were abundantly sufficient. In addition, the judge informed the parties that he had reviewed the grand jury transcripts and found that

the questions which had been propounded before the grand jury originated from the authorized wire interceptions. Further, the court found that the interceptions had been carried out in conformity with the authority granted.

After giving Pavone ample opportunity to avoid contempt by responding to the grand jury inquiries, the court adjudged Pavone to be in contempt and ordered him confined in accordance with Section 1826(a), Title 18, U.S.C. Pavone's related motions to quash grand jury subpoena, to suppress and for continuance, were denied.

Our resolution of the issues must begin with consideration of *Gelbard* v. *United States,* 408 U.S. 41 (1972). In that case the majority assumed that the government had illegally intercepted communications of the grand jury witness and that the testimony sought was derived from the interceptions in violation of the statute.[3] The "narrow question" remaining was whether under those circumstances a grand jury witness could invoke the prohibition of Section 2515, Title 18, U.S.C., as a defense to contempt charges brought on the basis of the refusal of the witness to obey a court order to testify.[4] The Court found it unnecessary to decide if the witness could refuse to answer had the interception been pursuant to a court order. In his concurring opinion, Justice White comments on the question left open:

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[3] Title III, Omnibus Crime Control and Safe Streets Acts of 1968, 18 U.S.C. §§ 2510-20.

[4] Section 2515, Title 18, U.S.C., provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

> Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wire tap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. 408 U.S. at 70.

In his dissent, Mr. Justice Rehnquist anticipates the further problem of whether or not Congress intended to engraft on the traditional and rather summary contempt hearing a new type of hearing in which a grand jury witness is permitted discovery of the government's applications, orders, tapes, and transcripts relating to electronic surveillance. 408 U.S. at 75. Justice Rehnquist finds time-consuming challenges by witnesses during the course of a grand jury investigation to be inimical to its functioning 408 U.S. at 77.

Later in *United States* v. *Calandra,* 414 U.S. 338 (1974), not a wire interception case, the Court, evidencing concern for undue obstruction of the public interest in an effective grand jury process, held that a witness before a grand jury may not refuse to answer questions on the ground that the questions resulted from evidence obtained from an unlawful search and seizure. The grand jury institution, functioning under judicial supervision, is helpfully reviewed. 414 U.S. 342-46.

Pavone, relying on Section 2518(10)(a), Title 18, U.S.C.,[5] moved to suppress the grand jury subpoena and

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[5] Section 2518(10)(a) of Title 28, U.S.C., provides in pertinent part:

> (10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

the intercepted communications. We do not read the majority opinion in *Gelbard,* deciding only the "narrow issue," as mandating that whenever a grand jury witness seeks the protection of Section 2515 full discovery and an evidentiary hearing are automatically required. In any event, Congress provided that discovery of the contents of the interceptions is controlled by the judge's discretion. See note 5, *supra.*

In *In Re Persico,* 491 F.2d 1156 (2d Cir. 1974), *cert. denied,* 425 U.S. 911, similar discovery and hearing issues were considered. That court after considering the legislative history of the wire interception statute[6] concluded that an immunized witness is not entitled to a hearing or a motion to suppress during the course of the grand jury proceedings. Refusal of a witness to testify is justified, it is held, only in circumstances where there is

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[5] (Continued)

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

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[6] U.S. Senate Report, U.S. Code Cong. & Admin. News 1968, p. 2112, *et seq.*

no authorizing court order, or the government concedes the surveillance was not in conformity with the statute, or where there was a prior judicial determination to that effect. That court concluded that inasmuch as the trial judge had considered *in camera* the wire interception documents to determine statutory compliance, the witness had received all he was entitled to.

In addition to the Second Circuit, it appears that the Third, Fifth, and Ninth Circuits generally approve somewhat similar limitations. *United States* v. *D'Andrea,* 495 F.2d 1170 (3rd Cir. 1974), *cert. denied,* 419 U.S. 855; *United States* v. *Worobyzt,* 522 F.2d 196 (5th Cir. 1975), *cert. denied,* 425 U.S. 911; *Droback* v. *United States,* 509 F.2d 625 (9th Cir. 1974), *cert. denied,* 421 U.S. 964; *In Re Gordon,* 534 F.2d 197 (9th Cir. 1976). But see *In Re Lochiatto,* 497 F.2d 803 (1st Cir. 1974); *Melickian* v. *United States,* 547 F.2d 416 (8th Cir. 1977), *cert. denied,* 430 U.S. 986.

The accommodation between grand jury and statute mentioned by Justice White, 408 U.S. at 70, we believe, was fairly accomplished in the present case. The witness was immunized, although this relates to the Fifth, not Fourth, Amendment. The vital circumstance is that the electronic surveillance was court approved. All the electronic surveillance documents were examined by the trial judge *in camera* and found to comply with the statute. The questions propounded but not answered before the grand jury were found by the trial judge to have originated from authorized interceptions.

In addition to the considerations of delay, possible exposure of sensitive material affecting others, and jeopardy to witnesses and informants which full discovery and evidentiary hearings would often involve, there are other possibilities for abuse. It could serve to educate the witness and any associates and suggest to receptive minds that testimony be tailored to only that which is believed to be already known to the grand jury. Pavone received all that he was entitled to receive. As Justice Rehnquist stated, anything more would be "inimical to the function"

of the grand jury. No further interruption of the grand jury's investigation was justified. We also have independently reviewed *in camera* the sealed documents which were added to the record on appeal by order of this court and find them adequate.

Pavone made an additional general unsupported allegation in his Motion to Suppress that there were unspecified periods of time when the electronic surveillance was without benefit of any court order. However, the trial court, after *in camera* inspection, found the propounded questions to be derived from the authorized interceptions. The government's affidavits in support of the authorized wire interceptions, included in the *in camera* documents, also reflect on the absence of other interceptions. In this case nothing more was required on the part of the government to deny the allegation. *United States* v. *Yanagita,* 552 F.2d 940, 943 (2d Cir. 1977).

The only specific factual allegation argued on appeal by Pavone to show that the provisions of Title 18, § 2510, *et seq.*, were not complied with relates to a requirement of § 2518(8)(a) that, "[i]mmediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions." At the hearing in the district court, the government explained that at the time for sealing, due to the absence from Chicago of the issuing district judge, in this case Chief Judge Parsons, the recordings were made available to Acting Chief Judge Will for sealing, and were sealed. We find this slight deviation from the literal wording of the statute to be no basis for a finding that the electronic surveillance was illegal.

Pavone also objects to the fact that it was Chief Judge Parsons who made the *in camera* inspection of the supporting documents because Chief Judge Parsons was the judge who had authorized the electronic surveillance. The contempt proceeding was directly related to the grand jury proceeding temporarily suspended to await the possibility of Pavone's testimony. As a part of Chief Judge

Parsons' responsibilities under the wire interception statute and his judicial supervision of the grand jury process, it was appropriate for him to make the *in camera* review as part of the contempt proceeding. The record reveals that full and careful consideration was given by Chief Judge Parsons to the issues in this case. We note also that to require that any *in camera* review be performed by a different judge would be impractical in several districts in this circuit and cause even greater grand jury delay.

We do not by our holding in this case intend to limit the exercise of a trial judge's sound discretion when exceptional circumstances, not existing in this case, may justify an expanded proceeding. We find no error in the trial court's rulings on Pavone's other motions.

We affirm the order of the district court adjudging Pavone in civil contempt and directing his imprisonment, and also affirm the rulings of the district court in all related orders. Our mandate shall issue forthwith.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 2, 1978

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

IN THE MATTER OF THE SPECIAL FEBRUARY 1977 GRAND JURY.

Appeal Of: Alfred Pavone.

No. 78-1020

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 76-GJ-1631
JAMES B. PARSONS, *Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this court entered this date. An opinion more fully explaining the reasoning of the court will be filed in the near future.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 13, 1978

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

In the Matter of:
SPECIAL FEBRUARY, 1977 GRAND JURY
Appeal of Alfred Pavone

No. 78-1020

Appeal from the United States Court for the Northern District of Illinois, Eastern Division.
No. 76 GJ 1631
JAMES B. PARSONS, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforementioned petition for rehearing be, and the same is hereby, DENIED.

No. 77-1423

In the Supreme Court of the United States

OCTOBER TERM, 1977

ALFRED PAVONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1423

ALFRED PAVONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 570 F. 2d 674.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1978. A petition for rehearing with suggestion for rehearing *en banc* was denied on March 13, 1978. The petition for a writ of certiorari was filed on April 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon asserting the defense of unlawful electronic surveillance in a civil contempt proceeding, a recalcitrant grand jury witness is entitled to a plenary

hearing on the legality of the court-authorized interceptions and full discovery of all materials relating to the authorization and execution of the surveillance.

STATEMENT

On October 20, 1977, petitioner was summoned before a federal grand jury in the Northern District of Illinois. He asserted his Fifth Amendment privilege against compulsory self-incrimination and refused to answer the questions propounded to him (Pet. App. 2a). He was then granted immunity under 18 U.S.C. 6002 and 6003. After being resummoned before the grand jury, he again refused to testify, reasserting the privilege against compulsory self-incrimination and claiming that the grand jury's inquiries were based upon illegal electronic surveillance (Pet. App. 3a). The government then filed a petition with the district court asking that petitioner be found in civil contempt.

At a hearing on the contempt petition, the government disclosed that the questions propounded to petitioner by the grand jury were derived from a wire interception of his conversations. The interception, the government noted, was authorized by a court order entered pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520 (Pet. App. 3a). Petitioner alleged, as a defense to the contempt charge, that the court-authorized interception was unlawful because the statutory requirements of Title III had not been satisfied (R. 2). He requested full discovery of all materials relevant to the authorization and execution of the interceptions, he moved to suppress the intercepted conversations, and he requested a full evidentiary hearing on his motion (R. 2, 3, 9). In his discovery request, petitioner demanded an opportunity to hear all the original tape recordings of the intercepted conversations

and to inspect the transcripts of the conversations along with any logs or reports quoting or summarizing the conversations, copies of periodic reports by agents, copies of the affidavits and applications for court authorizations, and copies of the court orders authorizing the interceptions (Pet. App. 3a).

The district court found that petitioner's allegations of illegality were merely conjectural. Nonetheless, the court undertook an *in camera* inspection of the materials relating to the wire interception (Pet. App. 3a). Following that review, the court ruled that the wire interception authorizations and the supporting applications and affidavits were consistent with the statutory requirements. The court also found that the interceptions had been carried out in conformity with the court orders and that the questions asked of petitioner in the course of the grand jury proceedings derived from wiretaps that had been legally authorized. The court therefore denied petitioner's motion to suppress, ruled that no further hearing was necessary, and adjudged petitioner in civil contempt (Pet. App. 3a-4a).

ARGUMENT

1. Petitioner contends that the district court erred in assessing the legality of the wire interception *in camera* rather than granting his discovery motion and conducting a full adversary suppression hearing.

Analysis of petitioner's argument must begin with this Court's decision in *Gelbard* v. *United States*, 408 U.S. 41. The Court there held that 18 U.S.C. 2515 gives a witness a right to refuse to answer questions before a grand jury if those questions are the product of an illegal interception of his conversations conducted without court authorization. In *Gelbard*, however, the Court left open the question whether the Section 2515 defense would be

available if the interception were conducted pursuant to court order. 408 U.S. at 61 n. 22. In his concurring opinion, Mr. Justice White specifically addressed that problem and suggested that a "different accommodation" may be appropriate when the Government "produces a court order for the interception * * * and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order." 408 U.S. at 70 (White, J., concurring).

Petitioner seeks to extend *Gelbard* to apply to contempt proceedings in cases which the government has conducted its interceptions pursuant to a court order. In this setting, he contends, 18 U.S.C. 2518(9) requires that he be furnished a copy of the order authorizing the interception, along with the application for the order, and 18 U.S.C. 2518(10)(a) entitles him to move to suppress the fruits of the allegedly unlawful interception, and to obtain through discovery all the materials that may be relevant to his claim of illegality.

The court of appeals correctly rejected this claim (Pet. App. 4a-8a). The protracted interruption of grand jury proceedings that would result from plenary suppression hearings in such circumstances would substantially impede the investigative functions of the grand jury. See *United States* v. *Calandra*, 414 U.S. 338, 349-350. Furthermore, as the court of appeals observed, evidentiary hearings and disclosure of the documents supporting wire interception orders would expose sensitive material, possibly jeopardizing other witnesses and informants as well as "educat[ing] the witness and any associates and suggest[ing] to receptive minds that testimony be tailored to only that which is believed to be already known to the grand jury" (Pet. App. 7a).

These considerations have led a majority of the courts that have considered the issue to conclude that where a recalcitrant witness raises the claim of an illegal wiretap in defense to a contempt charge and the government produces a court order authorizing the interception, the district court is required to conduct only an *in camera* examination to determine the order's facial validity. The leading decision on this point is *In re Persico*, 491 F. 2d 1156 (C.A. 2), certiorari denied, 419 U.S. 924, which has been widely followed, both in the Second Circuit and elsewhere. See *In re Gordon*, 534 F. 2d 197 (C.A. 9); *In re Millow*, 529 F. 2d 770 (C.A. 2); *In re Grand Jury Proceedings*, 522 F. 2d 196 (C.A. 5), certiorari denied *sub nom. Worozbyt* v. *United States*, 425 U.S. 911; *United States* v. *Grusse*, 515 F. 2d 157 (C.A. 2); *Droback* v. *United States*, 509 F. 2d 625 (C.A. 9), certiorari denied, 421 U.S. 964; *In re Vigorito*, 499 F. 2d 1351 (C.A. 2), certiorari denied, 419 U.S. 1056. This resolution fairly accommodates the contemnor's Section 2515 defense and the need to avoid undue disruption of the grand jury's proceedings and to protect sensitive investigative materials from premature disclosure. The procedure petitioner advocates here, under which authorized interceptions could be challenged in full-blown suppression hearings, would result in protracted interruption of grand jury proceedings without substantially furthering the policies underlying Section 2515. *Gelbard* v. *United States, supra*, 408 U.S. at 70 (White, J., concurring); *id.* at 75-77 (Rehnquist, J., dissenting).

Nor do the statutory provisions on which petitioner relies require a different result. Petitioner suggests (Pet. 9-10) that the district court's *in camera* review of the transcript of the grand jury proceedings constituted a "disclosure of the contents" of his intercepted communications sufficient to trigger the discovery rights

under Section 2518(9), and that he was an "aggrieved person" under Section 2518(10), entitling him to discover all of the materials relevant to the electronic interceptions at issue.

With respect to Section 2518(9), the court's *in camera* review of a grand jury transcript is the very opposite of a "disclosure" of the intercepted communications. The court reviewed the materials relating to the interceptions *in camera* precisely because it deemed disclosure inappropriate. It would be unreasonable to construe *in camera* review as a "disclosure" within the meaning of Section 2518(9) so as to require production of the very materials the court deems too sensitive to disclose. Such a construction would make it impossible for a court ever to review wiretap materials *in camera* without providing disclosure to the target.

With respect to petitioner's claim for discovery under Section 2518(10)(a), that Section provides that discovery will be subject to the district court's discretion. Even if a contempt proceeding under 28 U.S.C. 1826(a) is a "proceeding" within the meaning of Section 2518(10)(a),[1] discovery may properly be limited according to the scope of the inquiry in the contempt proceeding. Since in this case an *in camera* review of the relevant materials was sufficient to dispose of petitioner's claims, it was unneccessary—and indeed would have been inappropriate—for the court to grant petitioner discovery rights to the sensitive wiretap materials.

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[1]We doubt that a contempt proceeding is a "trial, hearing, or proceeding" of the kind referred to in Section 2518(10)(a), since the contempt mechanism "is so intimately connected with the grand jury proceedings in which the testimony is desired as to be really a part of those proceedings." *In re Persico, supra*, 491 F. 2d at 1162; *In re Gordon*, 534 F. 2d 197, 199 (C.A. 9); see *Gelbard* v. *United States, supra*, 408 U.S. at 80-84 (Rehnquist, J., dissenting).

2. As petitioner correctly states, the courts of appeals differ in their view of the scope of the inquiry a district court should conduct when a recalcitrant grand jury witness raises a Section 2515 defense in a contempt proceeding. In the case of *In re Lochiatto*, 497 F. 2d 803, the First Circuit held that where the government does not object to disclosure on secrecy grounds, the witness should be allowed limited discovery of documents supporting the interception to assist him in asserting his Section 2515 defense.[2] Yet even under *Lochiatto*, the contemnor is not entitled to litigate issues such as the truth of an affiant's statement or the extent of the minimization of the interception by federal officials. *In re Lochiatto, supra*, 497 F. 2d at 808. Moreover, if an objection to disclosure on secrecy grounds is made by the government, an *in camera* examination by the court is all *Lochiatto* requires unless the secret material can be successfully excised from the disclosed documents. *Ibid.* Furthermore, when the putative contemnor's claim is that the authorization is invalid on its face—petitioner's primary claim in this case[3]—the *Lochiatto* court did not

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[2]Under the decision in *Lochiatto*, discovery would be limited to the authorization application of the Attorney General or his designate, the affidavits in support of the court order, the court order itself, and an affidavit submitted by the government indicating the length of time the surveillance was conducted. *In re Lochiatto, supra*, 497 F. 2d at 808.

[3]Petitioner asserted twelve reasons before the district court for his belief that his communications were unlawfully intercepted. Ten of these claims dealt with the facial validity of the authorization of the Attorney General, the application, and the order itself (R. 2). Petitioner's additional claim that the tapes of the interception were improperly sealed was correctly rejected by the court below, which held that in view of the absence of the judge issuing the interception order, the "slight deviation from the literal wording of the statute" in having the sealing function performed by a substitute judge is "no

require an evidentiary hearing, noting that "facial viewing by the court [is] sufficient to demonstrate facial validity or invalidity." *Ibid.* See *In re Mintzer*, 511 F. 2d 471, 473 (C.A. 1); *In re Marcus*, 491 F. 2d 901 (C.A. 1). Accordingly, while the *Lochiatto* decision is in conflict with the decision below in its analysis, it is not clear that application of the principles of *Lochiatto* would have produced a different result in this case.

In addition to *Lochiatto*, petitioner relies on *Melickian* v. *United States*, 547 F. 2d 416 (C.A. 8), certiorari denied, 430 U.S. 986, and *In re Grand Jury Investigation* (*Maratea*), 444 F. 2d 499 (C. A. 3). These cases, however, are not in conflict with the decision here. The *Melickian* court indicated in dictum that it substantially approved the procedure set out in *Lochiatto*, but since the government in that case made a valid claim that the materials requested by the contemnor were sensitive, the court of appeals approved an *in camera* review of the kind conducted in this case. In those circumstances, the court ruled that the denial of Melickian's motion for discovery and for an evidentiary hearing was not an abuse of the district court's discretion.

The *Maratea* case is even less clearly on point. In *Maratea*, a pre-*Gelbard* decision, the court of appeals remanded the case to the district court for "a hearing on [the] contention that [the witness] is privileged not to testify because his testimony would constitute a disclosure by the government of the contents or fruits of illegal electronic surveillance directed against him." 444 F. 2d at

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basis for a finding that the electronic surveillance was illegal" (Pet. App. 8a). Petitioner's final claim—that his conversations were derived from other interceptions not authorized by court orders—was rejected by the district court, which found that the grand jury's questions originated from the authorized wire interception (Pet. App. 4a).

500. It is unclear from the language of the opinion whether the hearing contemplated was a full adversary hearing of the kind requested by petitioner with respect to the illegality of the wire interception. In any event, the *Maratea* court took no position with respect to the discovery rights, if any, of the recalcitrant witness in such a proceeding.

Although it may be necessary for this Court at some point to resolve the apparent conflict between the decision in *Lochiatto* and the decisions of the courts that have followed the Second Circuit's lead in *Persico*, at present it appears that the conflict may be more theoretical than real. In light of the approach taken by the court in *Melickian*, it may well be that a case will rarely, if ever, arise in which the principles of *Lochiatto* will require more than *in camera* examination of the wiretap authorization materials. Accordingly, we submit that, for now at least, the apparent conflict need not be resolved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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